IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1022 of 1995

For Approval and Signature:

HON'BLE MR.JUSTICE D.K.TRIVEDI
and
HON'BLE MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

PANNABEN MANGUBHAI HALPATI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 1022 of 1995
MR KR RAVAL for Petitioner No. 1
Mr.K.P.Raval, learned Addl.P.P. for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE D.K.TRIVEDI
and
HON'BLE MR.JUSTICE D.P.BUCH

Date of decision: 03/02/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE D.K.TRIVEDI)

1. The appellant original accused has preferred this Appeal and challenged the order of conviction and sentence recorded by the learned Addl. Sessions Judge, Valsad at Navsari passed in Sessions Case No.59 of 1991 on 10.10.1995 convicting her for the offence under Section 302 of the I.P.C. and ordering to suffer R.I. for life. The Appeal is pending for final hearing since its admission on 22.1.1996 and on considering the notice regarding bail issued, the court has as per order dated 7.2.1996 refused bail. However, the trial court was directed to prepare the paper book and forward the same on or before 31.5.1996 and the office was directed to place the matter after receiving the paper book for final hearing after Summer Vacation. Though the matter was fixed on Board after Summer Vacation of 1996, the Appeal could not reach for final hearing and ultimately as per order dated 27.9.2000 the Application for bail of the appellant was considered and in the said Application being Criminal Misc. Application No.5106 of 2000 the appellant applicant was released on bail on certain conditions.

2. When the Appeal was notified before us for final hearing, we have heard Mr.K.R.Raval, learned advocate, who appeared on behalf of the appellant as the appellant has filed this Appeal through jail. Mr.Raval has accordingly while arguing the Appeal taken us through the evidence of the prosecution witnesses recorded during the trial and the judgment under challenge. Mr.Raval appearing for the appellant has vehemently urged that looking to the evidence led by the prosecution and the way in which the order of conviction and sentence is recorded by the learned trial Judge, solely by relying upon the dying declaration of deceased Radhaben, the learned trial Judge has committed error and it is his submission that looking to the so called dying declaration of Radhaben, looking to her condition when she has sustained burn injuries to the extent of 95% of 2nd and 3rd decree of burn, she would not be in a position to give her dying declaration and relying upon such dying declaration by the learned trial Judge, it has resulted into miscarriage of justice. According to Mr.Raval that earlier dying declaration of Radhaben was made before her mother, who has not supported the prosecution and the prosecution has treated Laduben as hostile witness and in view of the subsequent dying declaration recorded by the Doctor as well as by the

Police and by the Executive Magistrate, though Radhaben has involved the appellant, reliance on such dying declaration is not proper in view of the fact that Radhaben had sustained burn injury at the instance of appellant Pannaben in the morning at 8 A.M. at the residential house of the deceased, where she was residing with her parents, and the dying declaration was recorded by the Doctor at the Civil Hospital at Valsad at noon about 12 '0' Clock and looking to the burn injuries found on Radhaben it was not possible for her to give such version involving the present appellant and the acceptance of such evidence by the learned trial Judge convicting the appellant accused deserves to be set aside and the appellant accused be acquitted by allowing the Appeal.

3. Mr. K.P.Raval, learned Addl. P.P., has supported the judgment under challenge. According to him that though Laduben, mother of deceased Radhaben, has not supported the prosecution case and she was declared hostile to the prosecution, however the oral dying declaration of Radhaben before her is proved and she in term has stated in her police statement about the incident, where Radhaben has sustained burn injuries at the instance of the appellant accused. He next urged that not only that, when she was shifted to Civil Hospital at Valsad, the history was recorded by the Doctor in the medical case papers and such history is given by the patient herself and as found from the medical case papers, the deceased Radhaben, when she was admitted for treatment in Civil Hospital at Valsad, has disclosed the fact in which she has sustained burn injuries and she has in term disclosed the name of the appellant who had poured kerosene on her and ignited because of which she has sustained burn injuries. Mr.Raval has also submitted that when Radhaben was taken in injured condition at Civil Hospital at Valsad, the Medical Officer attached to Civil Hospital had informed the police on telephone and the police had also recorded the complaint of injured Radhaben in detail and the complaint given by Radhaben before the police also suggest about the burn injuries sustained by her, as according to Radhaben the kerosene was poured on her by the appellant and it is further found that after such born injuries is received by her, her mother had taken her to a Doctor at Pardi Hospital and, thereafter, as per the advice of Doctor at Pardi she was required to be admitted at Civil Hospital at Valsad and accordingly Radhaben was taken to Valsad Hospital in a rickshaw. Further looking to the condition of the patient Radhaben and as per the Yadi issued to the Executive Magistrate,

Radhaben's dying declaration was also recorded by the Executive Magistrate and even Radhaben in her dying declaration has disclosed the manner in which she has sustained injuries and it is only the appellant who has poured kerosene on her and thereafter she has sustained burn injuries. Accordingly Mr.Raval, learned Addl.P.P., has vehemently urged that the prosecution has established the case beyond reasonable doubt, wherein even in the oral dying declaration of deceased Radhaben before her mother, before the Doctor, before the Police and, thereafter, before the Executive Magistrate, she in term has disclosed the name of the appellant, who had poured kerosene on her and she had accordingly received the burn injuries.

4. In light of the contentions raised before us, it is necessary for us to discuss the evidence of the prosecution witnesses, led before the trial court, in brief.

5. The appellant is closely related to deceased Radhaben, as Radhaben's brother was married to appellant. It is also an admitted fact that Radhaben, a young girl of 17 years, was unmarried and it is further found from the evidence that she had also gone to Mumbai where she was working and ultimately she returned from Mumbai and she was residing with the parents at village Pardi. The incident in question has occurred on 16.1.1991 at 8.0 A.M. at the house of the deceased where she was residing with her parents. When Radhaben was staying in her house according to the prosecution the accused Pannaben had poured Kerosene on her because of frequent quarrel between deceased and Pannaben, while her mother had gone for latrine and at about 8 '0' Clock the appellant accused Pannaben with an intention to kill Radhaben set her on fire with a match stick. The prosecution has accordingly examined Laduben, who has not supported the prosecution during the trial and accordingly the prosecution has treated her as hostile witness. What is important to note is that though she has denied that she has given her statement before the Police in respect of the oral dying declaration of Radhaben, however according to the prosecution when Laduben had returned from latrine at her house at 8 '0' Clock in the morning, Radhaben has told her that her son's wife Pannaben with an intention to kill her poured kerosene on her body and set her on fire with match stick. According to prosecution that Radhaben was not doing work in the house and Pannaben, wife of her son, is frequently quarreling with her. On the day of incident, Pannaben was staying in her house and Radhaben had told the witness that Pannaben with

intention to kill her poured kerosene on her body and set her on fire with match stick.

5.1 As found from the cross examination of the witness Laduben, Radhaben was unmarried and she delivered child being a spinster because of illicit relation with someone. On the previous day of the incident Radhaben had gone to see the picture without telling her and the witness had quarrel with her regarding this next day and after some time she burnt by pouring kerosene in the house and then rushed to Veranda. She started shouting. The accused Pannaben and her husband ran from their house and Mangu and the accused Panna tried to extinguish the fire from her body. Radhaben was burnt on major part of her body. She was not in a condition to speak or to understand. She and the people of Mohalla brought her to Hospital at Pardi where she was told that victim was burnt very much and she was required to be shifted to Valsad and accordingly she was shifted to Valsad Civil Hospital. Radhaben had died after four days in Hospital. The police man had come for investigation and other Government officer had also visited the hospital for investigation. Radhaben's statement was not recorded. No writing was made in the Hospital but thumb impression of Radhaben was taken twice. Laduben has also deposed before the court that she had a quarrel with Radhaben regarding her character and she has also in term deposed that it has not happened that accused Pannaben was provoking for such quarrel and her husband Bhanabhai had died one year ago, which is found from the re-examination of the witness.

6. At this juncture it is necessary for us to refer to the evidence of Dr.Kapilaben Shah, who was at the relevant time working as Medical Officer in Civil Hospital, Valsad. Dr.Kapilaben Shah - P.W.5 has deposed before the court that on 16.1.1991 Radhaben was brought in the Civil Hospital and she has examined her. Radhaben was brought by her father and the history given by Radhaben shows that at 8 '0' clock in the morning she has sustained burn injuries. The history was recorded in the medical case papers in the presence of two Doctors and one nurse. History found in the medical case papers shows that brother's wife was quarrelling and her mother had gone to latrine and when she was sitting, her Bhabhi came from behind and poured kerosene and set her on fire. The history was given by Radhaben when she was fully conscious. Dr. Kapilaben has also deposed that when she examined Radhaben, she was conscious and there was a smell of kerosene. About 95% of the body was found in burnt condition and there were 2nd and 3rd degree burns.

She has treated Radhaben in the Hospital and she died on 19.1.1991 during treatment at 9.10 P.M. The medical case papers were prepared by her and she has also produced the medical case papers of Radhaben. These medical case papers are at Exh.20. It is further found from her deposition that the Investigating Officer has not obtained the Certificate regarding the treatment of the deceased.

6.1 In cross examination Dr.Shah has deposed that on medical case papers Exh.20 on 3rd page the mentioning of 7.30 P.M. was in respect of the examination of the patient by Dr. Makwana and further that when Radhaben was admitted, her father was with her in the Hospital. On the medical case papers, the thumb impression of the father of the patient has also been taken at the time when the patient's condition was found serious and the thumb impression of the father was taken at 12.30 P.M. of the day when she was admitted in the Hospital. She has further deposed in cross examination that when the history was taken by her from the patient, her father was also present. The Investigating Officer has also not seen the case papers regarding patient prepared in the Hospital because according to her that the police has no right to see the papers and further that she did not state to the police the fact that the patient had told her that her Bhabhi set her on fire. The patient was brought in the Hospital without accompanied by police and she informed the police regarding the injury on the patient, which she has noted down in the medical case papers. According to her that the dying declaration is to be made before two witnesses and staff of the Hospital and when they record dying declaration, they do not follow any other formalities other than asking question to the patient. She has also denied that the dying declaration is not taken in the way dying declaration is to be taken as per law. She has taken the thumb impression of the patient of her right and left, both hands and she has denied that she do not know that which thumb impression of the lady person to be taken.

7. From the evidence of Dr. Kapilaben it transpires that she examined the patient Radhaben when she was brought at 12 noon on 16.1.1991 and she has taken the history from the patient herself. Exh.20 is the medical case papers and as found from the medical case papers, it was prepared by Dr. Kapilaben and as found, patient was admitted in the Civil Hospital at 12 noon on 16.1.1991. On the top of the medical case papers there is a left hand thumb impression of the father of the patient Radhaben i.e. of Bhanabhai and the father was informed

about the condition of the patient being serious by Doctor at 12.30 P.M. As found from the evidence of Dr.Kapilaben P.W.5 that the patient has come without Police Yadi and history of burn was recorded in her own hand writing in presence of two Medical Officers and staff members, who were on duty. On the left hand side on the margin of the medical case papers two thumb impressions of left and right hand of Radhaben is taken and the history, which was given by Radhaben, is also reflected. It is further found from her deposition that Dr. Makwana has made endorsement on the medical case papers Exh.20 on the very day i.e. on 16.1.1991 at 7.30 P.M. Dr. Kapilaben has also treated the patient and the treatment provided is also found on the medical case papers. There were 95% burns over the body, of 2nd and 3rd degree burns, and smell of kerosene was also found, which is reflected in the medical case papers. Patient Radhaben had survived in the Hospital and she died during treatment on 19.1.1991 at 9.10 P.M.

8. So far as evidence of Dr.Kapilaben P.W.5 is concerned, it suggests that when patient was admitted for treatment due to burn injuries, she has disclosed the history, which Doctor has recorded in the medical case papers and as the patient had come without Police Yadi, Dr. Kapilaben had also made endorsement in the medical case papers, which shows that she has informed the City Police Station on telephone to Head Constable Mohammed. As found from the cross examination, there is nothing to indicate that whether Radhaben was in fit condition of mind or whether she was conscious to give statement. According to Dr.Kapilaben when she examined Radhaben she has given history and she was fully conscious and the history given by Radhaben was reflected in the medical case papers Exh.20. It is equally true that at the time when Dr. Kapilaben had examined Radhaben, her father was also present and he was also informed about the serious condition of the patient Radhaben, for which an endorsement was made on the medical case papers at 12.30 noon and the thumb impression of the father was taken.

9. Mr. K.R. Raval, learned advocate appearing for the appellant, has vehemently commented that evidence of Dr. Kapilaben, to the effect that she has recorded the dying declaration of Radhaben and as accepted by the learned trial Judge, is not believable as according to Mr.Raval that when Radhaben has sustained 95% of burn injuries in the morning at 8 A.M. at her residence situated at Pardi and when Dr.Kapilaben, Medical Officer attached to Civil Hospital, Valsad had examined her after four hours, it is difficult to accept that such history

was given by Radhaben to Medical Officer and the prosecution has examined the witness to suggest that the medical case papers are prepared showing that Radhaben has given history about burn injuries sustained by her. Mr.Raval has accordingly vehemently urged that Laduben examined by the prosecution, a real mother of Radhaben, has not supported the prosecution and as found from the evidence of Laduben that first Radhaben was taken at the Hospital at Pardi and as per the advice of the Medical Officer, Radhaben was to be admitted for her burn injuries at Civil Hospital, Valsad and as found from the evidence of Laduben that Doctor at Pardi had also treated Radhaben and she was also injected. Radhaben was not in a position to give statement or the history to Dr. Kapilaben and accordingly the prosecution has examined Dr. Kapila to show that history was given by Radhaben for which Kapilaben had taken two thumb impressions of both the hands of deceased Radhaben and as the injections were applied to Radhaben, it is difficult to accept the prosecution version that Radhaben was in fit condition to give history after four hours to Dr. Kapilaben at Civil Hospital, Valsad.

10. On going through the cross examination there is nothing to indicate that defence has posed any question to Dr.Kapilaben to suggest that Radhaben was not in fit condition to give statement or whether Radhaben was conscious at the time when she was brought and admitted at Civil Hospital, Valsad. The suggestion that however posed to Dr. Kapila was to the effect that even she has not informed the Police about history being given by Radhaben when she was admitted in the Hospital. The fact remains that P.W.5 had in term recorded the history which was given by Radhaben when she was brought at the Civil Hospital at Valsad and at that time the father of Radhaben was also present.

11. It is also equally for us to refer to the evidence of Jivanbhai - Police Constable P.W.9, who has deposed that at the relevant time on 16.1.1991 he was working as Constable in City Police Station, Valsad and he has received written order from the Officer of the Police Station that a woman has been admitted in burnt condition in Valsad Civil Hospital. He accordingly had proceeded to Civil Hospital at Valsad and he saw Radhaben - the patient in burnt condition. Radhaben has informed him that Pannaben, her brother's wife, is quarreling with her and by pouring kerosene on her body set her on fire. P.W.9 has recorded the statement of Radhaben in his own handwriting and he has also taken right hand thumb impression of Radhaben before him. He has also recorded

the statement of father of Radhaben and the statements of Savitaben, Naranbhai and Laduben. Laduben in her statement has stated that as Radha was not doing work in the house her son's wife Pannaben was quarrelling with her and she has poured kerosene. Laduben in her statement has stated that at 8.0 A.M. she had gone for latrine. At that time Pannaben with an intention to kill Radhaben poured kerosene on her body, set her on fire with a match stick. That fact was informed by Radhaben to her. The complaint of Radhaben is at Exh.28.

11.1 As found from the cross examination that he could not recollect the name of P.S.O., who has instructed him to record the complaint and he has no document of such order being issued. The statement of Radhaben, which was recorded, was also sent before the Pardi Police Station. He has admitted that if the F.I.R. is not registered at Valsad Police Station, without any order he could not record the statement. He can not say that whether such order was given from Pardi Police Station to Valsad Police Station or not. It is further found from the cross examination that he first approached the Nurse at the Hospital and inquired where the patient is and accordingly he reached at the bed of patient Radhaben where other patients were also there in the room where Radha was admitted in the Hospital and about three persons were near when Radhaben was being treated and some injections were also applied on Radhaben by giving bottle. According to witness the condition of Radhaben was serious, however, she was in a position to speak. He had denied the suggestion that Radhaben could not understand the question and, therefore, she was not giving any answer to him and further Radhaben had injuries on her face as well as on her entire body. He had denied the suggestion that he has not taken any statement of Radhaben and further denied that he has obtained the thumb impression of Radhaben in presence of relatives of Radhaben.

11.2 Exh.28 is the statement in the form of complaint of Radhaben and Radhaben has in term stated in her complaint about the manner in which kerosene was being poured by the accused Pannaben on the morning at 8 P.M. and further that the persons nearby to the residence had also come running, including her brother Mangu and they also tried to extinguish the fire on her and her mother Laduben took her to the Dispensary of Dr. Mohanbhai Dahyabhai in rickshaw where she was treated by giving injection and, thereafter, she was taken to Civil Hospital at Valsad.

12. Jagdishchandra Bhavsar - P.W.4 has deposed that on 16.1.1991 he was working as Deputy Mamlatdar at Valsad and he has received the Yadi for recording the dying declaration of Radhaben and accordingly he went to Civil Hospital, Valsad. He approached the Medical Officer and inquired about the patient and Doctor had taken him near the patient and he has recorded the dying declaration. He informed the patient that he being an Executive Magistrate, he had come for recording her dying declaration, for which patient has disclosed her name and even the cause for burn injuries found on her, which Shri Bhavsar has recorded as per the say of patient and he took the right hand thumb impression of the patient. According to him that he has recorded the statement of patient as per her say and he has obtained the right hand thumb impression on the said document of patient Radhaben. Exh.17 is the dying declaration and on verifying the original dying declaration, the same is in question and answer form. The questions are typed one and the answer, which Radhaben has given, has been taken by Bhavsar as per the say of Radhaben. As found from the dying declaration of Radhaben, she has given detail about her name with name of her father, her age and about her business and the place where she resides. While answering the question No.10 posed by Shri Bhavsar it is found that Radhaben has stated in her dying declaration about the manner in which the incident has occurred at her house. There is also reference that the brother with his wife is residing nearby her house and the accused is off and on quarrelling with her by disclosing the name of accused as Pannaben, who had poured kerosene on her and at that time her mother has gone for answering the natural call and she has sustained burn injuries and she was admitted in the Hospital, where she was brought by her father and mother in rickshaw. There is also a left hand thumb impression of Radhaben and the said thumb impression was made by her before Shri Bhavsar - the Executive Magistrate, Valsad.

12.1 As found from the cross examination according to Mr. Bhavsar in Civil Hospital he was taken near the patient by Doctor and when the patient was lying in a room he could not say that how many other persons were there. He has also denied that at the time, the eyes of the patient were closed. The general condition of the patient was found serious. In her dying declaration recorded by him, the question that has been found typed in the document were posed to the patient. He could not say that when he has recorded the dying declaration of the patient at that time whether any bottle were applied to the patient or not and in respect of removal of the

relatives from the patient, he has not made any note in the dying declaration. He took about 15 minutes to record the dying declaration. He has denied the suggestion that the patient was not conscious and was not in a position to give statement and he has also denied that he went away after taking the thumb impression of the patient in presence of relatives of the patient. He has denied the suggestion that he has not met the Doctor at the Hospital and further that he has not gone with the Doctor near the patient. Exh.17 is proved by Shri Bhavsar P.W.4 and the dying declaration of Radhaben was recorded on the very day i.e. on 16.1.1991 between 13.45 hours and 14 hours.

13. Mr. K.R.Raval, the learned advocate appearing for the appellant, has also vehemently urged that from reading the dying declaration, there is nothing to indicate that Shri Bhavsar has taken any certificate of the Doctor attached to Civil Hospital about the condition of the patient whether that patient was conscious or whether she is in fit condition of mind to give her statement. Mr.Raval has also vehemently commented upon the evidence of P.W.4 Shri Bhavsar that according to him that he has taken the right hand thumb impression of Radhaben on her dying declaration while the dying declaration Exh.17 suggest and found that Radhaben has put left hand thumb impression on her dying declaration Exh.17. According to Mr. Raval that in absence of any Certificate obtained by Mr.Bhavsar, the document Exh.17 could not be considered as dying declaration of Radhaben and further that when the patient had sustained about 95% of burn injury on her body, her condition is not such for which she can give her dying declaration at about 13.45 to 14 hours when she has sustained burn injuries in the morning at 8 A.M. at her residence situate at village Pardi.

14. P.W.10 Dr.Bipinchandra Lallubhai was examined by the prosecution who has performed the post mortem on the dead body of deceased Radhaben. Dr.Bipinchandra, Medical Officer attached to Civil Hospital, Valsad had deposed that on 20.1.1991 a dead body of deceased Radhaben Bhanabhai was received under Police Yadi from P.S.I. Valsad City at 10.0 A.M. and the post mortem on the dead body of Radhaben was started with Dr. Joshi on the very day. As there was no facility in the Civil Hospital, Valsad, the post mortem was performed at Municipal Hospital, Valsad. On the dead body about 95% of burn injury was found on the body of Radhaben. The injuries were ante mortem. According to his opinion, the death was caused by 95% of burn injury and this injury is

sufficient to cause death. The post mortem note was prepared by him as well as by Dr.Joshi and the same was prepared in his hand writing and signed by him as well as by Dr.Joshi. The post mortem note is proved, which is at Exh.33. The Medical Certificate is also signed by him and proved, which is at Exh.34.

14.1 In cross examination it is found that the condition of the patient was very serious as there were 95% burn injury and the patient was burnt on the face. It is further brought by the defence that the person with such injury can speak less naturally than the normal person can speak.

15. As found from the post mortem note, the burn injuries were noted down in the post mortem note and in column No.16, 95% of burn was found all over body and the cause of death is due to 95% of burn injuries over body.

16. Exh.34 is the Medical Certificate of Radhaben, which shows that she was 17 years of age and the cause of death is peripheral vascular shock after 90% burns over body.

17. We are not discussing the other part of the evidence in detail regarding the investigation carried out by the Investigating Officer as well as the drawing of Panchanama in presence of Panchas, namely, inquest panchanama, recovery of the articles, cloth of the deceased etc. The learned trial Judge has on considering the prosecution case and as per the evidence led before him in term recorded finding by holding that the prosecution has proved that Radhaben's death was due to burn injuries by kerosene, which has resulted into culpable homicide and the prosecution has also further proved that it is the accused, who had poured kerosene on her and set her on fire by match stick with intention to cause her death.

18. As discussed above, the prosecution has placed reliance upon the dying declaration of Radhaben before the witnesses as well as her dying declaration recorded by the Executive Magistrate. The incident in question has occurred in the morning at 8 A.M. on 16.1.1991 at the residence of Radhaben where she was residing with her parents. The appellant accused is closely related to deceased and it is the case of the prosecution that she was also residing near the house of the deceased separately. Accused is the wife of brother of deceased and though the prosecution has placed reliance upon the evidence of Laduben, the mother of deceased, before whom

Radhaben has immediately made dying declaration by disclosing the name of the appellant accused, who in term poured kerosene on her and set her on fire, however Laduben has not supported the prosecution and she has turned hostile to the prosecution. Savitaben, the neighbour examined by the prosecution, has also not supported the prosecution as she also turned hostile to the prosecution and accordingly we are not discussing her evidence in detail. However, it is also found from the evidence of Laduben that immediately Radhaben was taken to a Hospital at Pardi and as per the medical advise as the condition of Radhaben was found serious, she was required to be treated by admitting her at Civil Hospital, Valsad. The incident in question has occurred at 8 '0' Clock in the morning and as found from the evidence of Dr. Kapilaben P.W.5, Radhaben was brought in the Civil Hospital at Valsad by her father and Dr. Kapilaben has also taken history from patient Radhaben, where history was also recorded in the medical case papers, which is at Exh.20. According to Dr. Kapilaben at the time when the patient was brought before her, she was conscious and the patient was found having 95% of burns of 2nd and 3rd degree burns. There is nothing to suggest in the cross examination of Dr. Kapilaben that patient Radhaben was not conscious or not in a position to give statement. Dr. Kapilaben has in term informed the Police on telephone, which is also found on the medical case papers at Exh.20. Jivanbhai, Head Constable, had also recorded the complaint of Radhaben and in the complaint of Radhaben she has also stated the fact about the incident, which has occurred at her residence early in the morning at 8.0 A.M. and even in the complaint according to Radhaben when she was sitting in her house, it is the accused - her Bhabhi who had poured kerosene on her and set her on fire. P.W.4 Shri Bhavsar, who was at the relevant time working as Deputy Mamlatdar, had recorded the dying declaration of Radhaben while visiting the Hospital and Shri Bhavsar has also proved the dying declaration, which was recorded by him as per the say of Radhaben, and the said dying declaration is on the record at Exh.17. As found from the evidence of Shri Bhavsar that according to him, he has taken the right hand thumb impression of Radhaben on the document while in the dying declaration Exh.17 it is found that Radhaben has put her left hand thumb impression on her dying declaration.

19. In light of this evidence, when mother Laduben has not supported the prosecution, however as found from the evidence of Dr. Kapilaben, who has recorded the history given by Radhaben, which is reflected in the

medical case papers Exh.20, wherein Radhaben has while giving history to Dr. Kapilaben, stated that the accused had poured kerosene and set her on fire. The medical case papers Exh.20 also suggest that said history was recorded by Dr.Kapilaben in presence of two Medical Officers and also in presence of Nurse. The thumb impression is also taken on the medical case papers and in the endorsement, which is found in the medical case papers, it was recorded that at 12.30 noon the father of deceased Radhaben was informed about serious condition of patient Radhaben. It is true that Radhaben had 95% burn injuries of 2nd and 3rd decree burns, which she has received on 16.1.1991 at 8.0 A.M. at her residence where her mother Laduben had gone to answer the natural call and when she returned, Radhaben has informed her about the injury which she has sustained due to pouring kerosene by the accused and setting her on fire by the accused. Radhaben was first taken to Doctor at Pardi where she was given treatment and as per medical advice, she was to be admitted in Civil Hospital, Valsad and accordingly the parents of Radhaben had taken the injured patient in burnt condition in rickshaw at Civil Hospital, Valsad. Dr. Kapilaben is an independent witness. She has no grudge against accused and it is also not suggested by the defence that she has not recorded the dying declaration, as the medical case papers Exh.20 suggest that the history, which was given, was recorded by Dr. Shah in her own hand writing and both the thumb impressions of the injured were taken in presence of two Medical Officers and staff Nurse. It is difficult for us to accept the submission of Mr.K.R. Raval that the prosecution has failed to establish the case, as according to him that due to burn injury sustained by injured Radhaben that being 95% of the burns and of 2nd and 3rd degree burns, it is not possible for her to give dying declaration either before Doctor or before the Police. Nothing is brought by the defence in the examination of witnesses that no history was given by Radhaben when she was admitted at Civil Hospital where history was recorded by Dr.Shah P.W.5.

20. In view of the findings recorded by the learned trial Judge, in our view that the conviction recorded by the learned trial Judge is based on the dying declaration of deceased Radhaben, which is proved by the prosecution. In our view, there is no error committed by the learned trial Judge while accepting the evidence of prosecution in the form of dying declaration of Radhaben recorded by the Doctor as well as by the Executive Magistrate.

21. Accordingly appeal is dismissed and the order of

conviction and sentence recorded by the learned Addl. Sessions Judge, Valsad at Navsari on 10.10.1995 in Sessions Case No.59 of 1991 for the offence under Section 302 of the I.P.C. is hereby confirmed. Bail bond furnished by the appellant accused stands cancelled.

Considering the request made by Mr.Raval, who appeared for the appellant, four weeks time is granted from today to the appellant to surrender to the jail authority. Accordingly appellant accused to surrender to the jail authority, as aforesaid.

(D.K.Trivedi,J)

(D.P.Buch,J)

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